

**IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

OWEN J. ROGAL, D.D.S., P.C.,

Plaintiff,

V.

SKILSTAF, INC.,

Defendant.

**CIVIL ACTION NO.
3:06-cv-00711-MHT**

MOTION TO STRIKE PLAINTIFF'S JURY DEMAND

Defendant Skilstaf, Inc. (“Defendant”) hereby submits a motion to strike Plaintiff’s jury demand because, under ERISA, Plaintiff is not entitled to a jury trial. In support of this Motion, Defendant offers the following grounds:

1. In its Complaint, Plaintiff asserts that Defendant wrongfully withheld benefits under the Skilstaf Group Health Plan (“the Plan”). See Compl. at ¶¶ 3-13, attached as Ex. 1 to Notice of Removal of Action Under 28 U.S.C. § 1441 (“Notice of Removal”) (Doc. 1).

2. The Plan is an employee welfare benefits plan governed by the Employee Retirement Income Security Act of 1974, 29 U.S.C § 1001 et seq. (“ERISA”). See Skilstaf-00003, attached as Ex. A to the Aff. of Robert Johnson, which was filed contemporaneously with Def.’s Brief in Support of Def.’s Mot. for

Summ. J. (Doc. 39).

3. As Defendant has previously made clear, and as Plaintiff has expressly conceded, Plaintiff's Complaint asserts an ERISA § 502(a) claim to recover benefits due to Plaintiff under the terms of the Plan. See Notice of Removal at ¶¶ 6-10 (Doc. 1); Def.'s Brief in Support of Def.'s Mot. for Summ. J. at 10-11 (Doc. 39); Order on Pretrial Hr'g at 2, submitted to the Court by Plaintiff on or about August 9, 2007 (conceding that "[s]ubject matter jurisdiction exists under . . . 29 U.S.C. 1132 (ERISA)").

4. In December 2005, Plaintiff demanded a trial by jury. See Demand for Trial by Jury of Twelve Members (Doc. 6).

5. The Eleventh Circuit has made clear that "no Seventh Amendment right to a jury trial exists in actions brought pursuant to ERISA." Stewart v. KHD Deutz of Am. Corp., 75 F.3d 1522, 1527 (11th Cir. 1996); see Broaddus v. Florida Power Corp., 145 F.3d 1283, 1287 n.** (11th Cir. 1998) (confirming that "[t]he district court was correct in granting [the defendant's] motion to strike [the plaintiff's] demand for a jury trial on the ERISA claim" because "[r]elief under ERISA is limited to equitable remedies").

6. Federal Rule of Civil Procedure 39 provides, in pertinent part, that "[t]he trial of all issues so demanded shall be by jury, unless . . . (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of

those issues does not exist under the Constitution or Statutes of the United States.”

FED. R. CIV. P. 39 (a).

7. Because Plaintiff is not entitled to a jury trial under ERISA, the Court should strike Plaintiff’s jury demand in this case.

8. In its Answer, Defendant asserted, as an affirmative defense, that “[u]nder ERISA, Plaintiff is not entitled to a jury trial.” Def.’s Answer and Countercl. at 6 (Doc. 24).

Respectfully Submitted,

s/Charles A. Stewart III

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Robert E. Cole
437 Chestnut Street, Suite 218
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Beth A. Friel
Jeanne L. Bakker
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and I hereby certify that I have mailed by U. S. Postal Service the document to the following non-CM/ECF participants: None.

/s/ Amelia T. Driscoll